

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1268

To be argued by
IRVING ANOLIK

In The
United State Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ALLAN SONNENSCHIN,

Defendant-Appellant.

*On Appeal From the United States District Court For the
Southern District*

BRIEF FOR APPELLANT

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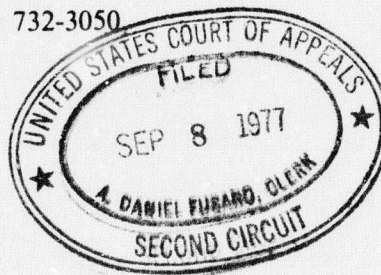


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UNITED STATES OF AMERICA,

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DEFENDANT-APPELLANT'S BRIEF

STATEMENT

Defendant-appellant, Allan Sonnenschein, is appealing to this Court from the judgment of the United States District Court, Southern District of New York, rendered the 24th day of May, 1977, convicting him of violating 21 U.S.C 846 (Conspiracy to distribute a Schedule II Controlled Substance), after trial before Hon. Gerard L. Goettel, D.J. and a jury.

The jury "hung" for the second time* on Count Two, the substantive Count, and a mistrial as to that was declared. The Court sentenced appellant to three years' imprisonment, but specified that only three months thereof should be spent in a jail-type institution. Appellant is free pending appeal.

* The First trial ended in a "hung" jury on both counts.

INTRODUCTORY

The defendant-appellant, a relatively young man, never before in trouble with the law, married and a career civil servant of many years service, was convicted of conspiracy with intent to distribute Quaaludes, a Schedule II drug, but not a narcotic. This was his second trial, on a Two Count Indictment, the first trial having ended in a "hung" jury.

There are several aspects of reversible error to which the appellant wishes to direct this Court's attention:

The First is the fact that Appellant was not represented by adequate counsel, a fact of which the Judge took notice, saying in essence that the appellant had cause to consider a mal-practice action and lamenting the unpreparedness of counsel.

The original lawyer for appellant, a Mr. Stephen Laifer, was present during the examination of the witness, Leslie Triffleman, and conducted cross-examination. At this juncture, he begged leave of the Court to depart for a vacation in Bermuda, saying that the defendant's rights would be adequately protected by the services of another lawyer who would appear the following Monday, David Jacobs, Esq.

While the appellant indicated that he had no objection, he was hardly prepared for what happened the next Court day, when Mr. Jacobs announced that he was totally unprepared to

go forward; that he was surprised and amazed that Mr. Laifer would expect him to proceed; and on top of everything else, Jacobs was totally unaware of what questions had been asked and answered during the testimony of the important witness, Triffleman, the cooperating co-defendant.

Nor did Jacobs know what representations had been made by Laifer during his opening to the jury. The minutes were not available, and there was some question as to whether Sonnenschein could afford them, even if they had been transcribed.

A second aspect of error, was the fact that the testimony of Agent DiGravio, the undercover agent, was so incredible that it was unworthy of belief. For example, DiGravio testified that he had exchanged five bottles of Quaaludes, wrapped in a paper bag for \$900. in currency, which he gave to appellant in a public restaurant while being surveilled, about 10 or 15 feet away by his supervisor, Agent White and another agent, Whalen.

Incredible as it may seem, both agents, White and Whalen, testified that they did not see anything being passed at the restaurant and did not see any money being given to Sonnenschein. This is all the more amazing, since DiGravio testified that appellant held the money in his hands about 15 seconds and "fanned" the bills as to count it. Moreover, DiGravio said

that the bag of pills spilled out on the floor of the restaurant, and that he had to pick them up. White and Whelan saw none of this, although they were presumably paying close attention since they were part of the surveillance team.

A third aspect of error, is the fact that the indictment was superceded after the first trial ended in a mistrial and a new indictment was presented to the Court for the purposes of the retrial. The dates of the conspiracy were changed, etc.

We maintain that where a mistrial occurs, it is possible to retry the defendant upon the same true bill, but not upon a different one, even though the differences are not major.

While there are other errors, we believe the foregoing are enough to orient the Court.

THE EVIDENCE AT TRIAL

The evidence at trial consisted of several witnesses. The Government relied primarily upon two, Leslie Triffleman, the co-defendant, and agent DiGravio, who was an undercover officer, and to a somewhat lesser extent upon a handwriting expert, Luciano Caputo.

Leslie Triffleman, testified that she pleaded guilty to the sale of 300 Quaaludes, Count Two, and was promised that she would not be prosecuted for any testimony she might give in Court. She also declared that she knew the defendant and worked for the same City agency he did (33-43).*

Triffleman said that both she and Sonnenschein worked for the Department of Social Services and that they had obtained prescriptions, some of which the defendant had forged, for pills (42-44).

The defendant's counsel moved for a mistrial when Exhibit 1 was offered by the Government on the grounds that it violated the attorney-client privilege (44-46). It was denied.

Exhibit 1, it should be noted, according to the discussion at page 44 of the record, was obtained from an attorney at a point in time prior to Leslie Triffleman cooperating with the prosecution.

* Numerals in parentheses refer to pages of the official Court reporter's minutes of trial, unless otherwise indicated.

Exhibit 1, was a note pad used by both Mr. Sonnenschein and Ms. Triffleman during the course of their alleged attempts to arrange to obtain pills directly from a pharmaceutical company or companies.

At page 45 of the record, Mr. Laifer, then counsel for defendant-appellant, Sonnenschein, declared:

"The issue is, where did she obtain it from? If this came into Sonnenschein's possession and then was given to an attorney who unlawfully let it out of his possession and gave it to Miss Triffleman for government use, then there are Sixth Amendment implications, as we previously discussed, and it certainly is something that should not be admitted into evidence.

That is why I tried to stop the contents and everything."

Assistant prosecutor Duhamel declared:

"Your Honor, that is clearly not the case, and I think Mr. Laifer, if he wishes, could either voir dire at this point or I would reserve offering it into evidence until after cross-examination, during which time he can cross-examine on those issues.

MR. LAIFER: The damage is already done. The jury already knows it is a document and what the contents are."

Leslie Triffleman testified that she and appellant actually tried to contact some pharmaceutical companies and were advised by the manufacturer of the Quaaludes called "Rorer", that a

local salesman by the name of Gus Arzaga handled the Quaalude in that particular area (46, 47).

A Dr. Miller was contacted by Mr. Arzaga, according to the witness (47).

Sonnenschein, according to Triffleman, prepared and used index cards with various different names to justify the prescription writing by Dr. Miller (49). The index cards were kept by appellant, according to Triffleman, in case the doctor was called for an audit (50). She stated that she began cooperating on March 8, 1977, and told the agents about the cards on that day (52, 53).

Triffleman testified that on December 3, 1976, she and defendant Sonnenschein had sold a quantity of Quaaludes to an undercover agent (55-58). This undercover agent was called "John" and had been introduced by a friend of hers named "Carol". Carol was a cooperating informant (57). The sale took place at about 3:00 or 3:30 on December 3, 1976, at which time John gave Sonnenschein \$900. for 300 pills, according to the testimony of Leslie Triffleman.

Triffleman testified that prescriptions were found in a book for Methaqualine (Quaaludes) and that some of the prescriptions were in the name of Allan Sonnenschein; Allan Bornstein; Stephen Moskowitz; Neil Weintraub; Craig Walker;

and Sharon Block (69-70).

Triffleman declared that she was informed by a Susan Novello, on December 9th, that this person "John" was actually a federal narcotics agent. She was not arrested until December 15th, 1976 (73).

A tape of the conversation between Triffleman and Agent DiGravio was recorded on December 8, 1976, and was adduced by the prosecution (76).

Triffleman, on cross-examination, admitted that she had two apartments in Manhattan, one in Florida, and one in the island of St. Maarten in the Caribbean (84-85).

She also testified that she owned a Jaguar automobile (88).

At page 104 of the record, Exhibit 1 was received in evidence and the objection of defense counsel was overruled. At that time, Mr. Laifer interposed another motion for a mistrial, which was denied, alleging that there were in fact at least two distinct conspiracies--one a conspiracy to obtain the controlled substance from a Dr. Miller, and the second, a conspiracy to obtain a product from the Rorer Laboratory itself (104-105).

Mr. Laifer declared that these two separate conspiracies

were not set forth in the indictment, had not been alleged by the Government, or voted by the grand jury in this case, and therefore insisted upon a mistrial. The motion was denied.

In the first trial, which ended in a mistrial, Dr. Miller's identity was made known. The superceding indictment referred to witnesses unknown. Defense counsel maintained that the witness, Dr. Miller, was known and therefore the superceding indictment should not refer to the phrase "witnesses unknown" (106).

Triffleman declared that the most she ever made altogether in selling these pills was about \$2,000. (117).

Triffleman further declared that she had told a Vivian Krasner, that she was going to sell pills to someone on December 3rd (130-131).

Triffleman asserted that to the best of her knowledge she had never met DiGravio or Carol Clifford prior to December 3rd (139). She declared that she handed the pills across the table to Agent DiGravio on December 3rd when they met in the restaurant and that the agent gave the defendant money but that he never counted it, but simply put it into his pocket (142).*

* It should be noted that this directly contradicted the testimony of Agent DiGravio (348). DiGravio had said that the defendant had fanned the money and held it for about ten or fifteen seconds. Agents White and Whalen, sitting 10 feet away saw nothing happen at all. Prof. Alvarez said Triffleman admitted setting-up appellant. (420).

Triffleman declared that she had gone to the apartment of Kathleen Alvarez, the estranged wife of Professor Alvarez, with the defendant-appellant, at which time he showed her 63 books containing names and "keys" to all the people that Dr. Miller was supposedly writing prescriptions for (162).

Triffleman further recalled that she lent money to Vivian Krasner right after getting it from the defendant, namely half of the \$900. resulting from the sale of the pills (163).

Following the testimony of Triffleman, an incident occurred, which will be discussed under an argument in the law part of this brief, but suffice it to say that Mr. Laifer who had opened to the jury and who had conducted the examination of the important witness, Triffleman, was excused from further participation in the trial because he had to go on vacation. Subsequently, a young lawyer by the name of David Jacobs came to Court on the next trial day and informed the Court that he was totally unprepared to proceed!

He did not know what questions had been asked of and answered by Triffleman, and, moreover, did not know what position Laifer had taken in his opening to the jury. On top of that, the minutes were not available, nor could the defendant readily afford them (169-184).

A druggist by the name of Morton Alperin testified for the prosecution and the Court permitted the prosecutor to go beyond the period of the named conspiracy because of the "ill-guided" line of cross-examination of counsel Laifer, who now no longer was present at the trial (191-193).

A motion for a continuance until Laifer returned was denied (193).

The Court noted that Laifer had "abandoned" his client.

Alperin explained that ordinarily no identification is requested when a person seeks to have a prescription filled (199-200).

Sidney Rothstein, a pharmacist, testified concerning certain Government exhibits (9A, 9B, 9C) which were prescriptions for drugs, but stated he did not recognize the defendant-appellant (209-210).

Francis White, a Special Agent of the Drug Enforcement Administration (DEA), testified that he was a Group Supervisor and had supervisory powers over Agent DiGravio (211-212).

Agent White declared that he was part of a surveillance team on December 3rd, 1976, and was present in the restaurant about 10 or 15 feet away from DiGravio, appellant, and Triffleman, when the alleged drug transaction and passage of money occurred (213-214).

White declared he did not know that the defendant was going to be there (217). He could not overhear any of the conversations (219), but could observe what was going on.

It is extremely significant that Agent White declared that he saw nothing passing between any of the individuals at the table and never saw any transfer of United States currency between any of those individuals (220, 233). He stated that he didn't even see any movement of hands like something was being passed (233-234).

White further asserted that no photographs or recordings were made (245-252).

Agent George Whalen of the DEA testified that he, too, was part of the surveillance team and was with Agent White on December 3, 1976. He, too, never saw the passage of any pills or the passage of any currency or anything of the sort, in that restaurant on December 3, 1976 (254-255).

Luciano Caputo, a handwriting expert, identified defendant's handwriting on Exhibits 3 and 10, which were introduced into evidence (265-269).

Vivian Krasner, testified that she was a student at Hunter College and identified both the defendant and Leslie Triffleman. She stated that the defendant had told her that he had sold Quaaludes (275).

Moreover, Krasner recalled that Leslie Triffleman gave her \$200. for furniture right after the December 3rd transaction (276-278).

Additionally, Krasner recollected that Sonnenschein had spoken to her about Quaaludes and Methaqualone and said that it was good and that therefore if she had been in this business, she would not have to work as hard (278).

Krasner, however, admitted that she was a good friend of Leslie Triffleman (279-280). The witness, Krasner, further conceded that she had never observed any Quaaludes in the house that she shared with Leslie, but had seen percodin (288-291).

Leslie Triffleman, she asserted, was under the care of a physician for injuries to her knees and used drugs (296-297).

Albert Hochman, who worked for a pharmacy, stated that he recognized the defendant as one Marty Sachs who presented prescriptions (315; 325; 328).

Leon Liebshardt, testified that he worked at the Plaza Pharmacy and identified the defendant as Marty Sachs (332). He had filed a prescription for Methaqualone, Liebshardt recollected, for this Marty Sachs (333).

John DiGravio, testified that he was a special agent for the DEA and that it was he who posed as an undercover purchaser of Quaaludes, accompanying Carol Clifford, an informer, to a

meeting at the Burger-Que Coffee Shop in Manhattan on December 3, 1976 (339-340). At that time he had met Leslie Triffleman because of an introduction provided by one Susan Novello (340).

He stated that he had no transmitters on his person and that no transmitters or recording devices were present (342).

He did recall, however, that Agents White and Whalen were present nearby surveilling the meeting (344).

He declared that Carol Clifford left the table where the four were meeting, that is the defendant, Triffleman, Carol and himself, at which time defendant asked for the money which DiGravio stated he gave him, namely the sum of \$900. and the defendant, he asserted, then "fanned" the money and held it for about ten or fifteen seconds (348). He recalled then that Leslie Triffleman handed him a bag containing the tablets or pills (348). He acknowledged that Sonnenschein surrendered himself to the DEA on December 15, 1976. Moreover, he declared that prior to December 3, 1976, he had never seen or heard about Allan Sonnenschein, the defendant-appellant herein (367).

As a matter of fact, DiGravio recalled that he dropped a bag of pills and five bottles rolled out on the floor of the restaurant (389).*

* It is remarkable to note that neither Agents White nor Whalen ever saw any such event occur. They could not confirm anything suspicious!

Finally, DiGravio admitted that Sonnenschein was not kept under surveillance after he left the restaurant on December 3rd.

THE DEFENSE

The defendant did not take the stand. He did, however, call three character witnesses, namely Professor Fernando Alvarez (413-428), Eleanor Lynch (428-430) and Gilbert Glotzer. (410-411) All testified as to his good character.

ARGUMENTPOINT I

APPELLANT WAS DENIED AND DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. FOLLOWING THE OPENING TO THE JURY AND THE EXAMINATION OF THE FIRST WITNESS (TRIFFLEMAN), STEPHEN LAIFER, ESQ., APPELLANT'S ORIGINAL LAWYER, DEPARTED FOR A VACATION IN BERMUDA, WITH THE APPROVAL OF THE COURT AND THE APPARENT CONSENT OF SONNENSCHN, UPON THE REPRESENTATION, HOWEVER, THAT A REPLACEMENT ATTORNEY, DAVID JACOBS, ESQ., CONTINUE THE TRIAL AND WOULD BE PERFECTLY COMPETENT TO DO SO. WHEN JACOBS APPEARED IN COURT THE NEXT TRIAL DAY, HE ANNOUNCED THAT HE WAS TOTALLY UNPREPARED: KNEW NOTHING ABOUT WHAT HAD OCCURRED PREVIOUSLY; WAS UNFAMILIAR WITH WHAT QUESTIONS AND ANSWERS HAD BEEN PROPOSED AND ELICITED FROM THE IMPORTANT WITNESS, TRIFFLEMAN, AND KNEW NOTHING ABOUT THE PROMISES MADE IN THE OPENING. A CONTINUANCE WAS DENIED AND THE COURT DIRECTED THE APPELLANT TO PROCEED.

In the case at bar, we submit, the defendant-appellant suffered a gross denial of effective assistance of counsel.

Having started the case with Stephen Laifer, Esq., who opened to the jury, and conducted the cross-examination of the important witness and cooperating co-defendant, Leslie Triffleman, Sonnenschein suddenly found himself abandoned in mid-trial because Laifer, his then attorney, insisted that he had to go on vacation to Bermuda and that waiting in the wings was none other than David Jacobs, Esq., an attorney

of a few years experience, whom Laifer maintained was ready, willing, and able to carry on with the case.

Sonnenschein, who had never been involved in a criminal case before, and who was not well in any event, having had 80% of his stomach removed, was faced with the Hobson's choice of continuing with a reluctant lawyer, who was champing at the bit to go on vacation, or accept the services of Mr. Jacobs, whom Sonnenschein thought was capable of proceeding.

One can imagine the alarm and consternation that beset appellant when lo and behold, on the next trial day, Mr. Jacobs announced that he was totally unprepared to proceed; that he wanted a continuance until Mr. Laifer returned; that he hadn't the slightest notion of how to proceed; and that he was totally unfamiliar with what had transpired during the examination of Leslie Triffleman. Additionally, Jacobs asserted that he had no idea of what promises or representations Laifer had made during his opening to the jury.

Mr. Jacobs told the Court, at page 180 of the record, that "...I have never felt in seven years of criminal trial practice, totally at a loss and totally unprepared."

The actual statement by Mr. Jacobs, at pages 179-180 of the record, was as follows:

"...It wasn't until last night, after court concluded, that I learned, quite to my amazement and surprise, that Mr. Laifer had proceeded to the point where he actually cross-examined a major Government witness, had opened to the jury and made promises, I'm told, to the jury as to what he was going to affirmatively prove, and I at this point, this morning, don't know one scintilla of what Mr. Laifer said in his opening, what Ms. Triffleman said under direct or under cross-examination, and I feel now, as I have never felt in seven years of criminal-trial practice, totally at a loss and totally unprepared."

Mr. Jacobs added, at page 183 of the record, "It is an over-whelming problem and it is one that I think will gravely affect Mr. Sonnenschein." He further informed the Court (183), "My preference is not to start [the trial] at all, really."

Explaining further, the colloquy revealed (193-194):

"THE COURT: Yes. It was a most ill-guided line of cross-examination, but he kept pursuing it and he finally pursued it all the way back to a couple of years ago.

MR. JACOBS: I recall that as I read the minutes. Judge, I might say that this is what I believe is the first of many times I am going to have to have a side bar and refer to things, or make objections on grounds wherein the Court will rule against me, I suppose, because Mr. Laifer has previously opened the door to that line of inquiry. And I think it will become more apparent as we progress that it is an unsatisfactory relationship at best my coming in at this stage and attempting to salvage something that Mr. Laifer has already begun but abandoned in midstream.

It is not the Court's problem certainly, but I only ask the Court, in the interests of justice, to protect the rights of the defendant, to grant us some type of continuance until Mr. Laifer returns.

THE COURT: Continuance nothing. The defendant is quite clear that he wants you trying the case. I think Laifer abandoned his client to go off on a vacation, but the client was in favor of that. Then with the continuance you are still stuck with what Laifer has done to date.

MR. JACOBS: I might say on that latest ground, during the lunch hour Mr. Sonnenschein, requested permission to speak to you alone.

THE COURT: I know.

MR. JACOBS: He advised me that he was advised by your Honor's secretary that that could not be done unless there was previous permission given by Mr. Duhamel and myself to that arrangement.

I don't know what the defendant wants to speak to your Honor about. I have difficulty in relating to the defendant. He is like a loose horse, to use the phrase, and I have no objection to him speaking to your Honor.

I think that he is going to object at this point to my continuing as his counsel on the grounds that I am ill-prepared or not adequately apprised of what preceded my entry into this case this morning. I suspect that is his motive and I think it is going to be more apparent as we progress that he may have well been right, that it is inuring to his ill benefit, or it is damaging to him beyond any repair to have to continue with an attorney unaware of a lot of things that happened in the case prior to his entry into it.

THE COURT: Well are you a partner in the firm?

MR. JACOBS: Not at all, your Honor. I am very loosely associated with that firm.

THE COURT: If this were a simple case, I would be very apprehensive that it was going to result in a malpractice suit against the firm. Maybe it can still result in a malpractice suit. I know it will very likely result in a habeas corpus or, more accurately, a 2255 being pursued on the basis of inadequate representation.

However, that is an extremely difficult case to make out when you've got retained counsel, which is what we have here.

I appreciate the problem you are in. I think the partners of your firm should appreciate the problem they are creating. But I can't do anything about it."

It is apparent, from the foregoing, that the defendant-appellant was placed on the horns of a dilemma by the ill-considered actions of Mr. Laifer and by the conceded inadequacy of Jacobs.

In short, he denied the effective assistance of counsel.

Two score and five years ago, Mr. Justice Sutherland wrote:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."
(Powell v. Alabama, 287 U.S. 45, 68, 69;
See also, dissent of Judge Oakes in Ricken-

backer v. Warden, 2 Cir., 1976, 550 F.2d 62, 68).

In Brubaker v. Dickson, 310 F.2d 30, 37, the Court aptly noted:

"Due process does not require 'errorless counsel *** but counsel reasonably likely to render and rendering reasonably effective assistance.'" (Emphasis ours). Cf. United States v. Handy, 203 F.2d 407; 23 C.J.S. Criminal Law §982(8).

It is the duty of the trial Judge to protect this basic right (Glasser v. United States, 315 U.S. 60). The right to counsel for one charged with a serious crime means something more than mere companionship during trial and certainly does not contemplate representation by an attorney who has become involved in a conflict of interest to the best interests of his client, so that a crucial witness is eliminated (see, Gideon v. Wainwright, 327 U.S. 335).

The highest Court of New York proclaimed in People v. Byrne, 17 N.Y. 2d 209, 270 N.Y.S. 2d 193:

"The right to have the assistance of counsel was held to be too fundamental to be made to depend upon nice calculations by courts of the degree of prejudice arising from the denial."

In People v. Tomaselli, 7 N.Y.2d 350, 353, the Court held that counsel must be functioning adequately to protect and assist the accused, otherwise he has no counsel at all.

The Sixth Amendment requires that the right to effective counsel be protected and preserved. Nothing in Faretta v. California, 422 U.S. 806, is to the contrary.

The rule in the Second Circuit was enunciated in United States v. Wight, 176 F.2d 376, 379 (2 Cir. 1949), cert. denied, 338 U.S. 950:

"[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice'. This court has reaffirmed this standard numerous times in recent years. Lunz v. Henderson, 533 F.2d 1322, 1327 (2d Cir. 1976); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); United States ex rel Walker v. Henderson, 492 F.2d 1311, 1312 (2d Cir.), cert. denied 417 U.S. 972, 94 S. Ct. 3179, 41 L.Ed. 2d 1144 (1974); United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973), cert. denied 415 U.S. 991, 94 S.Ct. 1590, 39 L.Ed.2d 888 (1974); United States ex rel Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917, 93 S.Ct. 977, 35, L.Ed.2d 279 (1973); United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir.), cert. denied, 402 U.S. 909, 91 S.Ct. 1385, 28 L.Ed.2d 651 (1971); United States v. Katz, 425 F.2d 928, 930 31 (2d Cir. 1970)."

In Rickenbacker, this Court did not flatly reaffirm its adherence to the quote "farce and mocker" test and, in fact, implied that perhaps that standard should be reconsidered. (Wight at 66 of 550 F.2d, where Judge Oakes dissented and voted to reject this standard).

We hasten to add, however, that in the case at bar the "farce and mockery" standard need not necessarily control, although there are patent overtones of such a situation. In the instant matter, however, the appellant was clearly deprived of the effective assistance of counsel, so much so that the trial judge himself recognized that a malpractice suit and a 2255 proceeding (28 U.S.C. 2255) would probably result because of the inadequate representation by counsel.

In United States v. DeCoster, supra, the Court clearly indicated a much broader application of the assistance of counsel rule than that applied heretofore in this Circuit.

In DeCoster, 487 F.2d at 1202, the Court proclaimed:

"In this regard we are mindful that there have been several important developments since Bruce. The test there, with its requirement of a 'heavy burden' to show 'unfairness', appears to rest on the theory that an ineffectiveness claim is grounded in the due process clause.¹⁰ Since then, however, the Supreme Court has implied¹¹ and this court has explicitly held¹² that effective assistance, like the right to counsel itself derives not

only from the due process clause, but from the sixth amendment's 'more stringent requirements'.¹³ Consistent with this recognition the Court has continued to repeat that the purpose of counsel is to 'preserve the adversary process'¹⁴ and that counsel must act 'in the role of an active advocate in behalf of his client'.¹⁵ In the guilty plea context, the Court has held that the accused's right to effective assistance is the right to 'reasonably competent' representation.¹⁶ And the Third,¹⁷ Fourth,¹⁸ and Fifth¹⁹ Circuits have already realized that there is no reason to require less when the accused does not plead guilty.²⁰ Accordingly, we adopt the following standard: a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.²¹ (Footnotes omitted).

There was no waiver of counsel herein (Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976)). The appellant did not traduce the Court processes, (Illinois v. Allen, 347 U.S. 343, 346-7 (1970)).

See, United States v. Lespier, ___ F.2d ___, 21 Cr. L. 2339, 2340, (1st Cir. 6/24/77).

POINT II

THE GROSS INCONSISTENCIES AMONG THE TESTIMONY OF DIGRAVIO, TRIFFLEMAN, WHITE, AND WHALEN, WERE SO DRAMATIC THAT THE COURT SHOULD NOT HAVE PERMITTED THE CASE TO GO TO THE JURY.

There were such dramatic inconsistencies in the testimony produced by the Government, that the Court should not have permitted the case to go to the jury (United States v. Taylor, 464 F.2d 240 (2d Cir. 1972)).

Agent DiGravio testified that acting in an undercover capacity he and Carol Clifford arranged to meet Leslie Triffleman at the Burger-Que Restaurant on December 3, 1976. Unexpectedly, they also met the defendant-appellant, who was completely unknown to the DEA.

DiGravio and Triffleman said there was a drug transaction whereby DiGravio obtained some pills in exchange for \$900.00, which he gave to Sonnenschein.

Triffleman declared that DiGravio gave the money to appellant, who immediately pocketed it. This directly contradicted DiGravio's testimony that Sonnenschein "fanned" the currency and held it for about 10 or 15 seconds.

Moreover, DiGravio stated that at one point he dropped the bag of pills on the floor of the restaurant and five bottles rolled out.

Agent White, who was the supervising agent in charge of the case, testified that he was surveilling the transaction on December 3rd, inside the restaurant, with Agent Whelan, and that he was about 10 or 15 feet away from DiGravio. Incredibly, White declared that he never saw anything that remotely indicated or resembled a drug transaction and that no money was passed, nor were any items exchanged.

Agent Whalen testified, corroborating Agent White.

Under the circumstances, it is manifest that the Court had such a dramatic conflict of testimony, that it should not have permitted the case to go further, especially in view of the fact that the Government called these witnesses and necessarily vouched for their credibility (United States v. Taylor, supra).

POINT III

THE COURT SHOULD HAVE GRANTED THE MOTION FOR MISTRIAL PREDICATED UPON A CLAIM OF MULTIPLE CONSPIRACIES SINCE MORE THAN ONE CONSPIRACY WAS PRESENTED.

At 104 of the record, a motion for mistrial was made by defense counsel Laifer, claiming that two conspiracies, at least, were being presented to the jury, namely one seeking to obtain a controlled substance from Dr. Miller, and another to obtain this item from Rorer Laboratories. These two conspiracies were not set forth in the indictment.

Moreover, Dr. Miller's name was not even mentioned in the indictment, although by the time the indictment was superseded, his identity was known.

In United States v. Rosenblatt, __F.2d__, 2 Cir. 4/19/77, Docket No. 76-1443, this Court declared that unless the precise conspiracy which the Government seeks to prove is alleged in the indictment, the proof is insufficient. In Rosenblatt, at 3035 of the slip opinion, this Court explained:

"We explained that the defendant 'had to know what kind of criminal conduct was in fact contemplated.' Id. at 763 n.1; cf. United States v. Calabro, 467 F.2d 973, 982 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973) (supplier of false identification must have known that it would be used in a transaction involving forged bonds in order to be guilty as an aider and abettor; general-

ized suspicion of illegal use would not suffice). Thus, it is clear that a general agreement to engage in unspecified criminal conduct is insufficient to identify the essential nature of the conspiratorial plan.

Proof of the essential nature of the plan is required because 'the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant.' United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). The importance of making this determination cannot be overstated. '[A]greement is the essential evil at which the crime of conspiracy is directed' and it 'remains the essential element of the crime.' Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975). 'Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it.' United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938)."

See, also, United States v. Bertolotti, 529 F.2d 149 (2 Cir. 1975).

POINT IV

THE INDICTMENT WAS SUPERSEDED AND CHANGES WERE MADE FOLLOWING THE ABORTING OF THE FIRST TRIAL BY VIRTUE OF A "HUNG" JURY. THE SUPERSEDING INDICTMENT WAS IMPROPER SINCE ANY RETRIAL HAD TO BE UPON THE IDENTICAL TRUE BILL AS THE ORIGINAL INDICTMENT, OTHERWISE DOUBLE JEOPARDY WAS VIOLATED.

The defendant-appellant was tried upon an indictment filed December 22, 1976, under number 76 Crim. 1141. That indictment fixed the period of the conspiracy from on or about the 3rd day of December, 1976, until the filing of the indictment, December 22, 1976.

In addition, that indictment charged appellant with dealing with a Schedule II "narcotic" drug. Moreover, in Count Two thereof, it listed the weight of the drug at 205.38 grams, also referring to it as a "narcotic".

In Indictment number (S) 76 Cr. 1141, which is the indictment which was employed in the instant case at the second trial, which is now under review by this Court, the period of the alleged involvement of the defendants in the conspiracy under Count One, is the 5th day of November, 1976, until the 1st day of February, 1977, thereby expanding the conspiracy by almost three months.

In addition, the drug involved is no longer called a

"narcotic" and the dosage referred to under the Overt Acts are diminished from 1,000 down to 300 dosage units.

In addition, under Count Two the weight of the drug is now only 90.87 grams instead of 205.38 grams.

Obviously, moreover, since a different foreman signed each indictment, it is manifest that a different grand jury returned each indictment. We maintain, therefore, that the court lacks jurisdiction by virtue of the superseding indictment which changed the charges upon which appellant was tried in the second trial from those which were extant in the first.

If an amendment of the indictment was required, this would have to have been done prior to the first trial by grand jury action. Once the first trial concluded in a mistrial, we maintain that any retrial, to survive double jeopardy and due process challenges, would have to be predicated upon the same indictment as that in the first trial. Any deviation which was more than de minimus would in effect be adding substance to the charges and, consequently, would be barred as exposing appellant to double jeopardy. (See Bryan v. United States, 338 U.S. 552; Sapir v. United States, 348 U.S. 373, Ex Parte Bain, 121 U.S. 1; United States v. Norris, 281 U.S. 619; Stirone v. United States, 361 U.S. 212; Carney v. United States (9 C.C.A. 1947), 163 F.2d 784, 788, cert. denied, 332 U.S. 824; Russell v. United States, 369 U.S. 749; United States v. Krepper, (3 C.C.A. 1946), 159 F.2d 958, cert. denied,

330 U.S. 824. See also, United States v. Robinson, D.C. Cir. 1973, 475 F.2d 376, 385).

We must bear in mind that the defendant did not consent to these changes, and by expanding the period of the conspiracy the Court permitted adding to the charges rather than withdrawing charges. We maintain that the foregoing was not only unconstitutional, but also plain error.

POINT V

THE COURT ERRED IN NOT GRANTING A MIS-
TRIAL WHEN THE PERIOD OF JURY DELIBER-
ATIONS VIRTUALLY EXCEEDED THE ENTIRE
LENGTH OF TRIAL.

This was a retrial on which the jury originally "hung". After the instant trial, the jurors were out an inordinately long period of time and, apparently, could not agree. The Court, however, insisted that they continue deliberating. Their deliberations exceeded the length of trial. We maintain that the Court should not have permitted such protracted deliberations on such a short case.

POINT VI

A SIXTH AMENDMENT VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE OF CONFIDENTIALITY WAS VIOLATED WHEN THE PROSECUTOR INTRODUCED AN EXHIBIT OBTAINED FROM APPELLANT'S LAWYER, SANS WAIVER.

At 104 of the record, the defense moved for a mistrial when the Court permitted the prosecutor to introduce evidence apparently obtained from appellant's lawyer. The Court did not hold any elaborate hearing, and although informed that the Sixth Amendment issue was clearly presented, nevertheless, ultimately permitted the proffered evidence into the record.

The error involved Exhibit 1, which was a document which had been obtained from an attorney representing Sonnenschein, without the latter's consent.

The Court, during the colloquy, was also told that if this document meant to refer to Dr. Miller, his name should have been mentioned in the indictment, since at the first trial his identity became known and he could no longer be described as a person "unknown" (106-107).

This was another manifestation of prejudice which befell appellant, since Jacobs was unfamiliar with the issue and this point had been raised by Laifer.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-
Appellant

COURT OF APPEALS - SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

ALLAN SONNENSCHEN,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York**

SS.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the **8th** day of **September 1977** at **1 St. Andrews Plaza**

New York, N.Y.

deponent served the annexed

Appendix **Brief**

upon

Robert B. Fiske Jr.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the **attorneys** herein,

Sworn to before me, this **8th**
day of **September 19 77**

Victor Ortega
Victor Ortega

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of **New York**
No. **31-0418950**
Qualified in **New York County**
Commission Expires **March 30, 1979**